Muthammah a/p Govindan v Masri bin Mohamed & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22-23-92(85)
ABDUL MALIK ISHAK J
28 DECEMBER 1999

Civil Procedure — *Judgment — Default of defence — Application grounded on fraud — Malay reservation land — Issues should be ventilated in trial proper — Court to exercise discretion to extend time to file defence — Whether decision to grant judgment in default of defence was wrong*

This written judgment arose from a letter from Messrs Samsudin Bahari & Rakan-Rakan enquiring about the decision given on 12 September 1994 with regards to encl 39 made pursuant to O 19 r 7(1) of the Rules of the High Court 1980 ('the RHC') whereby judgment in default of defence was given in favour of the plaintiff against the defendants. Enclosure 39 was grounded on the failure of the defendants to file their statement of defence within the period as set out in the RHC and supported by an affidavit affirmed by the plaintiff (encl 13). In encl 13, the plaintiff deposed that she was the owner of the subject matter in dispute ('the land'). She further deposed that by a fraud perpetrated on her, the defendants managed to get themselves registered as the owners of the land, which has since been classified as a Malay reservation land.

Held:

(1) The decision on 12 September 1994 was wrong in law as the issue of fraud should be ventilated by the parties in open court and not by way of an application in encl 39. Fraud was the essence of the plaintiff's case and she must prove it beyond reasonable doubt and this can only be done in a trial proper (see pp 526I–527B); *Saminathan v Pappa* [1981] 1 MLJ 121 followed.

(2) Although under O 19 r 7(1) of the RHC the court is bound to give judgment on an application under this rule, the court is vested with a discretion favouring the defendants if it is minded to by extending the time within which a defence may be filed and served provided no injustice is caused as the court would not enter a judgment which it would afterwards readily set aside on proper grounds being shown by way of an affidavit evidence (see pp 521H–524B); *Charles v Shepherd* [1892] 2 QB 622; *Wallersteiner v Moir* [1974] 3 All ER 217 followed.

(3) The issue of a Malay reservation would best be resolved in a full fledged hearing where the parties would have their say in open court (see p 528C).

(4) The maxim *impotentia excusat legem* (the law does not punish a person for not doing what they lacked power to do, or for being in a situation they were powerless to avoid) rings true in this case and

A it should be vigorously applied in favour of both the defendants (see p 528D–E).

[**Bahasa Malaysia summary**

B Penghakiman bertulis ini timbul dari sepucuk surat dari Tetuan Samsudin Bahari & Rakan-Rakan, yang membuat pertanyaan mengenai keputusan yang diberi pada 12 September 1994 berkenaan lampiran 39 yang dibuat menurut A 19 k 7(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') di mana penghakiman ingkar pembelaan telah diberikan kepada plaintif terhadap defendan.
C Lampiran 39 adalah berdasarkan kegagalan defendan-defendan memfailkan pembelaan mereka dalam jangka masa yang ditetapkan dalam KMT dan disokong oleh affidavit yang dibuat oleh plaintif ('lampiran 13'). Di dalam lampiran 13, plaintiff telah memberi keterangan bersumpah bahawa beliau adalah pemilik subjek perkara yang dipertikaikan ('tanah tersebut'). Plaintiff seterusnya
D mendeposkan bahawa melalui fraud yang dilakukan terhadapnya, defendan-defendan berjaya mendaftarkan nama mereka sebagai pemilik tanah tersebut, yang telah dikelaskan sebagai tanah rizab Melayu.

E **Diputuskan**:

(1) Keputusan pada 12 September 1994 adalah salah di sisi undang-undang oleh kerana isu fraud sepatutnya dihujahkan oleh pihak-pihak di mahkamah terbuka dan bukan melalui permohonan di dalam lampiran 39. Fraud adalah asas kes plaintif dan beliau mesti membuktikannya sehingga melampaui keraguan
F munasabah dan ini hanya boleh dilakukan di dalam perbicaraan yang sebenar (lihat ms 526I–527B); *Saminathan v Pappa* [1981] 1 MLJ 121 diikut.

(2) Walaupun di bawah A 19 k 7(1) KMT mahkamah terpaksa memberikan penghakiman di atas permohonan di bawah keadaan
G ini, mahkamah mempunyai budi bicara untuk memihak kepada defendan-defendan jika ia berhasrat berbuat demikian dengan melanjutkan masa di mana pembelaan boleh difailkan dan disampaikan dengan syarat tiada ketidakadilan diakibatkan oleh kerana mahkamah tidak akan memasuki penghakiman yang ia akan kemudian ketepikan di atas alasan-alasan yang wajar
H ditunjukkan melalui keterangan afidavit (lihat ms 521H–524B); *Charles v Shepherd* [1892] 2 QB 622 dan *Wallersteiner v Moir* [1974] 3 All ER 217 diikut.

(3) Isu mengenai rizab Melayu akan dapat diselesaikan dengan terbaik di dalam perbicaraan penuh di mana pihak-pihak
I mempunyai peluang berhujah di mahkamah terbuka (lihat ms 528C).

(4) Maxim *impotentia excusat legem* (undang-undang tidak akan menghukum seseorang kerana tidak membuat sesuatu yang

mereka kekurangan kuasa, atau di dalam situasi di mana mereka tiada kuasa untuk mengelak) adalah benar di dalam kes ini dan ia sepatutnya terpakai dengan bersungguh-sungguh di pihak defendan-defendan (lihat ms 528D–E).] A

Notes B

For cases on judgment in default of defence, see 2(2) *Mallal's Digest* (4th Ed 1998 Reissue) paras 2570–2578.

Cases referred to

Assets Co v Mere Roihi [1905] AC 176 (refd) C
Badiaddin bin Mohammad Mahidin & Anor v First Malaysia Finance Bhd & Anor [1988] 2 CLJ 32 (refd)
Charles v Shepherd [1892] 2 QB 622 (folld)
Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196 (refd) D
Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (refd)
Dykes v Thomson [1909] WN 104 (refd)
Graves v Terry (1882) 9 QBD 170 (refd)
Idris bin Haji Mohamed Amin v Ng Ah Siew [1935] MLJ 257 (refd)
Kapoor Singh v Haji Ibrahim bin Haji Mohamed Noor [1948] MLJ 29 (refd) E
Loi Hieng Chiong v Kon Tek Shin [1983] 1 MLJ 31 (refd)
Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491 (refd)
Middlesex County Council v Nathan [1937] 2 KB 272, [1937] 3 All ER 283 (refd)
Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224 (refd) F
(refd)
Petmal Oil (Malaysia) Sdn Bhd v Che Mariah bte Mohd Tahir (Trading as Delta Mec Enterprise) [1994] 3 CLJ 638 (refd)
PJTV Denson (M) Sdn Bhd & Ors v Roxy (M) Sdn Bhd [1980] 2 MLJ 136 (refd)
Public Finance Bhd v Narayanasamy [1971] 2 MLJ 32 (refd) (refd) G
Saminathan v Pappa [1981] 1 MLJ 121 (folld)
Smith v Buchan (1888) 58 LTNS 710 (refd)
Syarikat Joo Seng & Anor v Habib Bank Ltd [1986] 2 MLJ 129 (refd)
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81 (refd)
Tan Hong Chit v Lim Kin Wan [1964] MLJ 113 (refd) H
Teh Bee v K. Maruthamuthu [1977] 2 MLJ 7 (refd)
Tengku Mohamed Zairuddeen bin Tengku Mohamed Zaid v Wazuraiyah bte Mohamad and another appeal [1988] 1 MLJ 27 (refd)
Waimiha Sawmilling Co v Waione Timber Co [1926] AC 101 (refd)
Wallersteiner v Moir [1974] 3 All ER 217 (folld) I
Wan Ismail & Seng Liang Sdn Bhd v Musa bin Mat Jani & Anor [1990] 3 MLJ 178 (refd)
Wilmot v Young (1881) 44 LT 331 (refd)

A *Young v Thomas* [1892] 2 Ch 135 (refd)
Zainal Abidin bin Mohd Taib v Malaysia National Insurance Sdn Bhd [1994] 3 CLJ 731 (refd)

Legislation referred to

B Federal Constitution art 89(4)
FMS Malay Reservations Enactment 1941 (Cap 142) s 21
Johor Malay Reservations Enactment (No 1 of 1936) s 21
Kedah Malay Reservations Enactment (No 63)
Kelantan Malay Reservations Enactment (No 18 of 1930) ss 14, 18, 20
C National Land Code 1965 ss 4(2)(b), 340(1), (2)
Perlis Malay Reservations Enactment (No 7 of 1353)
Rules of the High Court 1980 O 2 r 1, O 19 rr 7, 9(1), (3), O 32 r 3, O 62 r 5
Terengganu Malay Reservations Enactment (No 17 of 1360) s 23

D *YC Wong* (*Mahinder Singh Dulku, Ismadi & Co*) for the plaintiff.
Defendants were unrepresented.

Abdul Malik Ishak J: On 28 December 1999, my former secretary by the name of Madam Zamatul Maznah bte Bahari of the High Court, Taiping, Perak alerted me by letter to the effect that Messrs Samsudin Bahari & E Rakan-Rakan, advocates and solicitors, from Butterworth wrote in enquiring about my decision which I handed down on 12 September 1994 with regard to encl 39 in favour of the plaintiff at the High Court, Taiping, Perak. Swiftly I acted and called for the records. Although there was no appeal with regard to my decision that was handed down on 12 September F 1994, yet I felt constrained to prepare this judgment.

Now, encl 39 was a summons in chambers filed by Messrs Mahinder Singh Dulku, Ismadi & Co, Advocates & Solicitors, in favour and for the benefit of the plaintiff. Enclosure 39 was an application under O 19 r 7(1) of the Rules of the High Court 1980 ('the RHC') which sought for the G following prayers:

(1) that the transfer from the plaintiff to the first and second defendants by way of a transfer of land vide Perserahan no 525/81, Jilid No 44, Folio No 140 that was registered on 15 May 1981 at the office of the collector of land revenue, Parit Buntar, Krian, Perak be struck off and that the names of the first and second defendants be deleted from the final title H and all relevant documents;

(2) a declaration that the transfer from the plaintiff to the first and second defendants via the transfer of land vide Perserahan No 525/81, Jilid No 44, Folio No 140 that was registered on 15 May 1981 at the office of the Collector of Land Revenue, Parit Buntar, Krian, Perak be declared null and void;

I (3) that the collector of land revenue, in the district of Krian, Perak be required to reinstate the plaintiff as the registered proprietor of all that piece of land known as Lot 731, EMR 3626, Mukim Bagan Serai, Krian, Perak in the final title and in all the relevant documents thereto;

(4) damages to be assessed by the senior assistant registrar of this High Court and after assessment to be paid by the first and second defendants to the plaintiff forthwith; A

(5) costs; and

(6) any other relief which this court thinks fit and suitable.

It was averred that the application was grounded on the failure of the first and second defendants to file their statement of defence within the period as set out in the RHC. B

Enclosure 39 was supported by an affidavit affirmed by the plaintiff on 22 August 1985 marked as encl 13 and there she deposed that the facts stated in the affidavit were within her personal knowledge save where the contrary showed otherwise. She then craved leave of this court to refer to the statement of claim that was filed on 22 August 1985 and she then deposed that she wished to adopt the facts stated in the statement of claim as part and parcel of her affidavit. She deposed that she is the owner of all that piece of land known as Lot 731, EMR 3626, Mukim Bagan Serai, Krian, Perak ('the land'). She then deposed that by a fraud perpetrated on her and the particulars of that fraud were said to be particularised in paras 5, 6, and 11 of the statement of claim, the defendants — referring of course to the first and second defendants, managed, so it was deposed, to get themselves registered as the owners of the said land vide Perserahan No 525/81, Jilid No 44, Folio No 140 on 15 May 1981 in the office of the Collector of Land Revenue, Parit Buntar, Krian, Perak. She also deposed that in the civil action filed herein she had asked this court for, inter alia, an order that the collector of land revenue, in the district of Krian, Perak to reinstate herself as the registered proprietor in the final title and in all the other relevant documents. She then deposed that in the event judgment would be in her favour, it would be nullified if the said land was disposed of by both the defendants before the final determination of the civil action filed herein. She verily believed that the said land has now been classified as a Malay reservation land, and in the circumstances she cannot enter a private caveat. She also deposed that an interlocutory injunction restraining both the defendants from disposing the said land was the only way to protect her interest and she then prayed for an order in terms of her application. C D E F G

It is interesting to point out that the plaintiff's application in encl 39 did not pray for an interlocutory injunction but somehow this prayer was incorporated in the affidavit in support in encl 13.

When I heard the application in encl 39 on 12 September 1994, Mr YC Wong appeared for the plaintiff and requested this court to hear encl 39 and it was his submission that encl 39 was sent to both the defendants but it was returned. Mr YC Wong also submitted that the affidavit of service in encl 12 showed that the process server had on 17 February 1986 left the writ of summons together with the statement of claim on each of the defendants. Mr YC Wong also drew my attention to the certificate of non-appearance dated 13 September 1988 that was filed as seen at p 7 of the bundle of pleadings and for these reasons he implored this court to grant the prayers in encl 39 particularly prayers (1), (2) and (3). H I

A This court then acceded to the request of Mr YC Wong and granted prayers (1), (2) and (3) of encl 39.

It is now apparent that in granting those prayers in encl 39, the merits of the case were not ventilated at all before me.

Order 19 r 7 of the RHC under which encl 39 was fashioned should be B reproduced as its reproduction would be germane to the occasion:

> (1) Where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in rr 2 to 5, then, if the defendant or all the defendants (where there is more than one) fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, apply to the Court for C judgment, and on hearing of the application the Court shall give such judgment as the plaintiff appears entitled to on his statement of claim.
>
> (2) Where the plaintiff makes such a claim as is mentioned in paragraph (1) against more than one defendant, then, if one of the defendants makes default as mentioned in that paragraph, the plaintiff may —
>
> D (a) if his claim against the defendant in default is severable from his claim against the other defendants, apply under that paragraph for judgment against that defendant, and proceed with the action against the other defendants; or
>
> (b) set down the action on motion for judgment against the defendant in default at the time when the action is set down for trial, or is set down E on motion for judgment, against the other defendants.
>
> (3) An application under paragraph (1) must be by summons or motion.

The prerequisite of this rule is the service of the statement of claim on both the defendants. The affidavit of service in encl 12 showed beyond per adventure that the process server had on 17 February 1986 left the writ of F summons together with the statement of claim on each of the defendants. The default of both the defendants in not serving their defence to the statement of claim would only arise after the service of the writ of summons and the statement of claim had been effected (*Wilmot v Young* (1881) 44 LT 331). Enclosure 39 was filed by way of a summons in chambers and this was the mode allowable by O 19 r 17(3) of the RHC. The summons in G chambers application of encl 39 was far cheaper and convenient and it can be expeditiously disposed off. Enclosure 39 must be served on both the defendants (O 62 r 5 of the RHC) not less than two clear days' before the day so specified therein (O 32 r 3 of the RHC). I venture to say and it is the law that the curative effects of O 2 r 1 of the RHC to cure non-compliance H with the rules cannot apply to an application for default judgment (*Syarikat Joo Seng & Anor v Habib Bank Ltd* [1986] 2 MLJ 129).

Order 19 r 7(1) of the RHC uses the phrase 'shall give such judgment as the plaintiff appears entitled to on his statement of claim' and it appears that this court has no choice but is bound to give judgment on an application under this rule. But the court is certainly vested with a I discretion favouring both the defendants if it is minded to by extending the time within which a statement of defence may be filed and served provided no injustice is occasioned thereby (*Charles v Shepherd* (1892) 2 QB 622 at

p 624; and *Wallersteiner v Moir* [1974] 3 All ER 217 at p 232 where that great judge Lord Denning remarked that 'the word "shall" ... is not imperative but directory'). It is a correct principle of the law to say and I so say that the court will not enter a judgment which it would afterwards readily set aside on proper grounds being shown by way of an affidavit evidence. Messrs Samsudin Bahari & Rakan-Rakan, advocates & solicitors, who wrote that letter of enquiry is certainly entitled to set aside the order of this court dated 12 September 1994. In *Graves v Terry* (1882) 9 QBD 170, the court laid down a sound principle of law worth noting and that is: in exercising its discretion to set aside a judgment in default the judge will exercise his discretion on the same lines when the application to obtain judgment in default is first heard. After hearing an application like encl 39, the court need not, as a matter of course, grant final judgment but instead may adopt a different approach by granting an interlocutory judgment and to refer the matter to the senior assistant registrar to ascertain the actual quantum of the claim as was done in *Charles v Shepherd.*

In obtaining a judgment in default what must the plaintiff do to prove her case? All she needs to do is to rely on her statement of claim. In my judgment, her statement of claim must be taken as admitted under the rule and no evidence or affidavit in support will be required but if an affidavit is filed like the present case, the court has a duty to peruse through that affidavit. Upon hearing the application for judgment in default of defence, the court too is empowered to order costs. All these principles of law can be distilled from the following cases and these cases are recommended reading for law students:

(1) *Smith v Buchan* (1888) 58 LTNS 710;

(2) *Young v Thomas* (1892) 2 Ch 135; and

(3) *Dykes v Thomson* (1909) WN 104.

A word of caution must be sounded. The statement of claim must plead everything that needs to be pleaded. Every material allegation must be pleaded and if it is not pleaded the application for judgment in default of defence may be dismissed (*Middlesex County Council v Nathan* [1937] 2 KB 272, [1937] 3 All ER 283).

Now, to the heart of the matter. The affidavit in support in encl 13 spoke of fraud that was said to be particularised in paras 5, 6 and 11 of the statement of claim. Paragraph 10 of the statement of claim reads as follows:

> The plaintiff avers that the transfer of the said land to the first and second defendants was effected by fraud on the plaintiff.

and the particulars of fraud set forth immediately after para 10 were worded as follows:

> *Particulars of fraud*
>
> Sometime in 1948 the said Anthony s/o Rayappan (now deceased) took the plaintiff to Parit Buntar and asked her to affix her thumbprint on a document ('the said document') (which) Anthony s/o Rayappan said to be a lease agreement. The plaintiff being illiterate accepted what was said by the

A aforesaid Anthony s/o Rayappan and affixed her thumbprint on the said document without knowing the true nature and effect of the said document.

It has now transpired that the said document is a power of attorney wherein the plaintiff is the donor and the first and second defendants donee of the power and it was through the use of the falsely procured power of attorney that the transfer of the said land to the first and second defendants B was effected.

In the transfer of the said land vide Pindah Milik Tanah Perserahan No 525/81, Jilid No 44, Folio No 140, the first and second defendants declared that the transfer was pursuant to the power of attorney given by the plaintiff to the first and second defendants dated the 23 February 1948 and registered in the High Court in Ipoh as P/A No 207/48 ('the said power of C attorney').

At para 11 of the statement of claim, the following was pleaded:

The plaintiff avers that the said power of attorney was obtained by fraud as aforesaid and wrongfully and unlawfully used to effect the transfer of the said land from the plaintiff to the first and second defendants.

D It is now trite law that upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land (s 340(1) of the National Land Code 1965). The phrase 'indefeasible title' means a title or an interest which is free of all adverse claims or encumbrances not noted in the register. It is quite obvious that the effect of registration is to defeat all prior unregistered claims. But being a E general principle the concept of indefeasibility is not absolute because under certain circumstances a registered title or interest may be set aside or defeated by a person who has a better claim. In law, these circumstances are amply spelt out under s 340 of the National Land Code 1965 ('NLC') and by the case laws. In short, in the absence of such circumstances the title or F interest is said to be indefeasible (*Teh Bee v K. Maruthamuthu* [1977] 2 MLJ 7 (FC); and *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 (FC)).

For the purpose of this judgment and since fraud was pleaded in the statement of claim, I shall proceed on the issue of fraud. Paragraph (a) of sub-s (2) of s 340 of the NLC enacts, inter alia, that in any case of fraud to G which the person or body, or any agent of the person or body, was a party or privy, the title or interest of such person or body shall not be indefeasible. Lord Lindley in the case of *Assets Co v Mere Roihi* [1905] AC 176 at p 210 explained the meaning of the word 'fraud' to mean 'actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud.' In the same vein it would be ideal to refer to the following cases: H

(1) *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 (FC);

(2) *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196 (FC); and

I (3) *Loi Hieng Chiong v Kon Tek Shin* [1983] 1 MLJ 31 (FC).

It is germane, at this juncture, to refer to the passage appearing in the decision of Lord Buckmaster in the case of *Waimiha Sawmilling Co v Waione*

Timber Co [1926] AC 101. There his lordship said at pp 106–107, the following:

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear.

My understanding of s 340(2)(a) of the NLC is this. Even if the person whose title or interest is being impeached could with diligence have discovered about the fraud this in itself is not evidence of fraud within the meaning of s 340(2)(a) of the NLC. But, on the other hand, if it can be shown (not an easy burden to discharge) that 'his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him' (per Lord Lindley in *Assets Co Ltd v Mere Roihi*). Fraud is easy to allege but difficult to prove. Fraud must be attached to the person whose registered title or interest is being impeached, by proving that he or his agent must be a party or privy to the fraud (*Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 (FC)). From my understanding of the law, there are two major categories of fraud:

(1) fraud held against a previous holder of a registered title or interest as exemplified in *Doshi v Yeoh Tiong Lay*; and *Datuk Jagindar Singh & Ors v Tara Rajaratnam*.

(2) Fraud held against the holder of an unregistered interest as exemplified in *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491 Privy Council; and *Public Finance Bhd v Narayanasamy* [1971] 2 MLJ 32 (FC). Of significance would be the proposition of law that fraud complained of under the NLC must have been committed before or at the time of registration (*Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors*; and *Public Finance Bhd v Narayanasamy*). The onus of proof would be on the party alleging fraud and that onus, according to *Saminathan v Pappa* [1981] 1 MLJ 121 (PC) would be to prove beyond reasonable doubt that the registration of the claim was obtained through fraud or by means of fraudulent ways. According to Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) in *PJTV Denson (M) Sdn Bhd & Ors v Roxy (M) Sdn Bhd* [1980] 2 MLJ 136 particularly at p 138:

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud.

Now, having dealt with the issue of fraud in extenso in particular in regard to the principles of law surrounding this ever fascinating area of the law, it would be apparent that when I decided encl 39 in favour of the plaintiff on 12 September 1994, I was not advised as to the fraud as alleged by the plaintiff which the plaintiff averred in her statement of claim that it was exerted upon her by both the defendants. It is now crystal clear that my decision on 12 September 1994 was wrong in law as the issue of fraud

should be ventilated by the parties in open court and not by way of an application in encl 39. I did say somewhere in this judgment that on the hearing of encl 39, I could on the strength of *Charles v Shepherd* and *Wallersteiner v Moir* extend the time within which a defence may be filed and served provided no injustice is caused. I should have taken heed of these authorities and not adjudicate encl 39 in favour of the plaintiff. Fraud was the essence of the plaintiff 's case and she must prove it beyond reasonable doubt and this can only be done in a trial proper. Order 19 r 9 of the RHC specifically provides that:

> The court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this order.

and both the defendants can certainly apply under this provision of the RHC to set aside my judgment dated 12 September 1994.

The Malay Reservations Enactments of the Malay states protect the Malays in regard to their interests in the land owned by them (see the FMS Malay Reservations Enactment 1941 (Cap 142) (applicable to the states of Negeri Sembilan, Pahang, Perak, Selangor and the Federal Territory), the Kelantan Malay Reservations Enactment (No 18 of 1930), the Kedah Malay Reservations Enactment (No 63), the Perlis Malay Reservations Enactment (No 7 of 1353), the Johor Malay Reservations Enactment (No 1 of 1936), the Terengganu Malay Reservations Enactment (No 17 of 1360), and Article 89 of the Federal Constitution) and the plaintiff deposed an affidavit to the effect that the said land has now been classified as a Malay reservation land. This brings to the forefront the issue of a Malay reservation land. From the available authorities, the law can be distilled as follows: any dealing, disposal or attempt to deal in or dispose of Malay reserve land in contravention of the Malay Reservations Enactments of the respective malay states are rendered null and void under the respective Enactments (*Wan Ismail & Seng Liang Sdn Bhd v Musa bin Mat Jani & Anor* [1990] 3 MLJ 178; *Zainal Abidin bin Mohd Taib v Malaysia National Insurance Sdn Bhd* [1994] 3 CLJ 731 at p 733; and *Badiaddin bin Mohammad Mahidin & Anor v First Malaysia Finance Bhd & Anor* [1988] 2 CLJ 32 at p 34). Even the attachment in execution of any Malay reserve land or holding owned by a Malay is strictly prohibited (*Kapoor Singh v Haji Ibrahim bin Haji Mohamed Noor* [1948] MLJ 29 at pp 30–31). Strict prohibitions would also be extended to the following situations:

(1) dealings in such land or holding by way of a power of attorney executed in favour of a person or an individual who is not a Malay (*Idris bin Haji Mohamed Amin v Ng Ah Siew* [1935] MLJ 257 at pp 259, 260–262; and *Wan Ismail & Seng Liang Sdn Bhd v Musa bin Mat Jani & Anor*; and

(2) creation of trusts of Malay reservations land in favour of individuals who are not Malays (*Petmal Oil (M) Sdn Bhd v Che Mariah bte Mohd Tahir (Trading as Delta Mec Enterprise)* [1994] 3 CLJ 638 at p 641 and *Tengku Mohamed Zairuddeen bin Tengku Mohamed Zaid v Wazuraiyah bte Mohamad and another appeal* [1988] 1 MLJ 27 at p 31).

On the other end of the scale, we have individuals who are not Malays and who owned lands which were later included within a Malay reservation, and these individuals are free to make dealings in favour of individuals who are not Malays (see art 89(4) of the Federal Constitution and *Tan Hong Chit v Lim Kin Wan* [1964] MLJ 113 (FC), a decision of the Federal Court sitting in Kuala Terengganu). It would be ideal to mention that the provisions of the National Land Code 1965 do not apply to Malay reservations land unless there are express provisions to the contrary (see s 4(2)(b) of the National Land Code, 1965, s 21 of the FMS Malay Reservations Enactment 1941 (Cap 142), s 21 of the Johor Malay Reservations Enactment (No 1 of 1936), s 23 of the Terengganu Malay Reservations Enactment (No 17 of 1360) and ss 14, 18 and 20 of the Kelantan Malay Reservations Enactment (No 18 of 1930), Kedah Malay Reservations Enactment (No 63), and Perlis Malay Reservations Enactment (No 7 of 1353) respectively. Without a doubt, the issue of a Malay reservation would best be resolved in a full fledged hearing where the parties would have their say in open court.

Judges are not infallible human beings. The law is developing day by day. Justice must be seen to be fair. It would be a miscarriage of justice if I were to say that the judgment which was handed down on 12 September 1994 was a perfect judgment. Far from it. The defendants should act swiftly under O 19 r 9 of the RHC to set it aside. The cue is now announced. Even the Court of Appeal can right the wrong . The maxim impotentia excusat legem (the law does not punish a person for not doing what they lacked power to do, or for being in a situation they were powerless to avoid) rings true in this case and it should be vigorously applied in favour of both the defendants. In the meantime, I await anxiously the outcome of this case.

Order accordingly.

Reported by Moy Saw Han